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The decision of the case of St. Louis & S. F. Ry. Co. v. Matthews, by the United States Supreme Court, affords an opportunity to Mr. Justice Gray who wrote the opinion to prepare an extremely learned and exhaustive discussion of the common law liability for accidental and negligent fires, of the statutory provisions regulating such liability, both in England and the various States, and of the right of the latter in the exercise of their police power to impose additional burdens and restrictions upon corporations previously chartered when deemed necessary for the protection of the lives, property, or health of the public. The decision, in substance, was that Act of Missouri, 1887, making railroad companies liable for property destroyed by fire communicated by their locomotives, and giving them an insurable interest in the property along their roads, is not in excess of the powers of the legislature; that such a statute does not operate to deprive railroad companies of property without due process of law, nor does it impair the obligation of the contract between such companies and the State, by which they are impliedly permitted to use fire in the operation of their roads, and that a statute making each company owning or operating a railroad within the State liable for property destroyed by fire from its locomotives does not deny to such companies the equal protection of the laws. It will be observed that the points of contention were the making of railroad companies liable for damage by fire from their locomotives, although without negligence and the applicability of such a statute to a railroad company previously incorporated.

The framers of the constitution of Utah undertook some radical measures in connection with the institution of juries. In that instrument it is declared that in capital cases the right of trial by jury shall remain inviolate, but in courts of general jurisdiction, except in capital cases, the jury shall consist of eight jurors, and in courts of inferior jurisdiction of four jurors. While in criminal cases the verdict must be unanimous, in civil cases three-fourths of the jury may find a verdict; also a jury in civil cases shall be considered waived, unless demanded by the parties, or one of them. In the recent case of State v. Bates, 47 Pac. Rep. 78, before the Supreme Court of Utah, this constitutional provision was attacked as in conflict with the federal constitution and therefore void; but the court, following many precedents, overruled it, upon the ground that the amendment to the federal constitution in regard to trial by jury applies only to the United States government and not to the States. The purpose of the provision of the Utah constitution, as the court states it, is to "secure the right to life, liberty and property, and the benefit of just laws. Hence, if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end, for there can be no magic in the number twelve, though hallowed by time. Intelligence, impartiality and integrity are qualifications which enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number. Legal process must submit to reform in the light of experience and advancing intelligence. True principles must endure, but the methods, modes and means of securing their application to human conduct, human rights and duties—the social system—will change with development and progress and more complicated conditions." The court was of the opinion that the people of the State had the power in the constitution to abolish the common law jury or to change it, as they did, by reducing the number from twelve to eight. The court cites, among other cases, Walker v. Sauvinet, 92 U. S. 90, wherein the United States Supreme Court nearly twenty years ago, held that a trial by jury in suits at common law, pending in the State courts, is not a privilege or immunity of national citizenship which the States are forbidden by the 14th amendment to abridge. While a State cannot deprive a person of his property without due process of law, this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. The constitutional requirement is met if the trial is had according to the settled course of judicial proceeding and due process of law is process according to the law of the land, as regulated by the law of

the State. States, therefore, may, if they choose, provide for the trial of all offenses against the States, as well as for the trial of civil cases, in the State courts, without the intervention of a jury, or by some different jury from that known to the common law.

The tendency of courts to frown upon suits for breach of promise to marry may be seen in the decision of the case of Yale v. Curtiss, by the Court of Appeals of New York, wherein it was held that in order to support a recovery for breach of promise there must be evidence of an express contract; that a mutual contract to marry could not be inferred from "mere courtship," or even facts tending to show an intention to marry on the part of the defendant. The New York court in its reasoning indicates that as "thorough acquaintance with character, habits and disposition is essential in order to make an intelligent contract" parties "may form such an acquaintance without having the inferences of a contract attach." Such decisions will go a long way towards abolishing many actions which are grounded upon mere flirtation and not upon express contracts of marriage.

NOTES OF RECENT DECISIONS.

PARENT AND CHILD — CUSTODY OF CHILD — RIGHT OF FATHER.—The Supreme Court of Wisconsin decides, in Markwell v. Pereles, 69 N. W. Rep. 798, that under Rev. St. § 3964, providing that the father of a minor child, if competent to transact his own business, and not otherwise unsuitable, shall be entitled to the custody of the minor, the father is not unsuitable because its maternal relatives, who have had the care of the child since its birth and the death of its mother, a period of 21 months, desire its further custody, and are able to give it better advantages than the father, who had remarried, and that a father is not "unsuitable," so as to authorize the court to deny him the custody of his child, which had been in the custody of its maternal relatives since its birth and the death of its mother, a period of 21 months, because he is reserved by nature, and, due to his business, is absent from his home a great part of his time, and that during his absence the child would be in the care of his second wife, the only objection to whom was that she was young, and without much experience in the care of children. In that case it appeared that a father, at his wife's funeral, requested that he be left alone with her remains. The two brothers of the wife remained in the room, and one of them requested the father to consent, in the name of his wife, that they should have the custody of the infant child. The father remained silent, and one of the brothers said to him that, if he would not speak, to shake hands. The father took their hands, and after the funeral left the child in their care, where it remained for 21 months. The father, during such time, constantly claimed the right to its custody. It was held that he had not surrendered his right to the custody of the child.

RAILROAD COMPANY — RELIEF ASSOCIATION —VALIDITY OF RELEASE.—In Chicago, Burlington & Quincy R. R. Co. v. Miller, 76 Fed. Rep. 439, the Circuit Court of Appeals for the Eighth Circuit, has held that in an action against a railroad company by one of its employees to recover damages for personal injuries through negligence, a plea that the employee had accepted benefits as a member of a relief association organized by the company, under an agreement that he thereby relinquished his right of action, does not form a valid defense when it fails to show that, if the association was at any time short of funds to meet its obligations to a member, that member could maintain an action against the company, or fails to set out the arrangement between the company and its employees with such fullness and certainty that the court may be able to see that the arrangement is fair and reasonable, and not against public policy, nor voidable for want of valuable consideration. The concurring opinion of Caldwell, Circuit Judge, is worth quoting: "Assuming that contracts of this character are valid, this case is rightly decided on the ground stated in the opinion. But such contracts, in so far as they attempt to release a railroad company from liability for injuries inflicted on its employees through its negligence, are without sufficient consideration, against public policy, and void, and must ultimately be so declared by all courts." This *dictum*, while not consonant with the weight

of authority, seems founded in reason and justice, and will prevail in time. The current of opinion is just now setting the other way. See 34 Am. L. Reg. (N. S.) 231.

TORTS—JOINDER OF ACTIONS—ANIMALS.—The Supreme Court of New Jersey decides in State v. Wood, 35 Atl. Rep. 654, that a joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals. "The reason which makes one who personally aids in or about the wrong done by another liable for the whole amount of the injury done, does not apply in a case like that under consideration. In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law, as a punishment for his wrongdoing, as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held, when the question has come before the courts, that joint action will not lie against separate owners of dogs which unite in committing mischief." Citing Denny v. Correll, 9 Ind. 72 (1857); Buddington v. Shearer, 20 Pick. (Mass.) 477 (1838); Van Steenburgh v. Tobias, 17 Wend. (N. Y.) 562 (1837); Auchmuty v. Ham, 1 Denio (N. Y.), 495 (1845); Partenheimer v. Van Order, 20 Barb. (N. Y.) 479 (1855); Adams v. Hall, 2 Vt. 9 (1829).

CONTRACT—SERVICES RENDERED IN EXPECTATION OF MARRIAGE.—In Lafontain v. Hayhurst, 36 Atl. Rep. 623, it is held by the Supreme Judicial Court of Maine that services rendered in expectation of marriage with the party served, and without any expectation of other remuneration, will not sustain an action of *assumpsit*, even though the party served refuses the expected marriage. The remedy, if any, is an action for the breach of the contract to marry, and the offering in evidence the services as elements of damage. The court says:

> No binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected, and from the language or conduct of the other party under the circumstances had reason to expect, such compensation from the other party.
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> In this case the plaintiff alleged a promise to make her compensation in money for the various services she rendered to the defendant. She testified, however, that she did not, at the time, expect any compensation in money or money's worth,—that she was engaged to be married to the defendant, and rendered the various services to him solely in consequence of that relation, and of that expectation of marriage. The defendant afterwards married another woman, and the plaintiff now claims that the defendant, having repudiated the promise of marriage, must now be held to have promised a money compensation for her services. She cites the case of Cook v. Bates, 88 Me. 455, 34 Atl. Rep. 266.
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> In Cook v. Bates, the plaintiff furnished board to the defendant without expecting money payment, but with the expectation that it would offset the labor furnished by the defendant to her for the same time. The defendant sued for his labor, and obtained judgment by default through some mistake. Thereupon the plaintiff sued for the board, and it was held that a promise to pay for the board could be inferred. The plaintiff expected compensation, not in money, but in money's worth, in the defendant's labor. The defendant, in suing for his labor, indicated an intention to pay for the board in money, and the plaintiff accepted this election. The defendant could not then be heard to say that his labor was to pay for the board.
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> Marriage, or a promise of marriage, may be a good consideration for a conveyance or a contract, when it appears that the conveyance or contract was made in consideration of the marriage or promise of marriage. In the case at bar, however, the plaintiff's services were not rendered as a consideration for the defendant's promise of marriage. That promise had been made before the rendering of the services, and upon another and different consideration—the promise of the plaintiff to marry the defendant.
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> The only contract between them was the mutual promise to marry. If the defendant has broken that contract, her remedy is by an action upon that contract for that breach. The services sued for here were no part of that contract, but merely incidents or consequences of it. The plaintiff expected no pay for them. Her expectation was confined to the promised marriage. With that she would have been satisfied. With damages for its loss she must be satisfied.

MUNICIPAL CORPORATION — NEGLIGENCE—ACCIDENT TO TRAVELERS.—In McHugh v. City of St. Paul, it is held by the Supreme Court of Minnesota, that a city is not ordinarily liable for an injury to a traveler while straying outside of an unfenced street, when the whole street is safe and convenient to travel upon, and that a city is under no ob-

ligation to light its streets, where they are safe and convenient for travel the whole width, unless the duty to do so is imposed by its charter. The court says:

The grounds of negligence alleged are (1) that the defendant city had neglected to build a fence or railing along the edge of this street, to prevent the traveling public from falling into the marsh; (2) that defendant neglected to furnish lights to enable travelers to avoid this dangerous place. There was no claim made that the street was improperly or unskillfully graded, or that the embankment was not properly constructed. Plaintiff was perfectly familiar with the street and neighborhood, with the location of the house, and that it was near, or, as he testified, alongside of the marsh. One of two things quite conclusively appears, viz., that he allowed his horse to go to the place of the accident unguided, or else that he drove the horse there himself. The undisputed evidence showed, by the wagon tracks, that, when nearly opposite the place of accident, his horse turned nearly at right angles with the highway, and in so doing, if he was in the traveled part of the road, he must have passed over the gutter, three feet wide, and the sidewalk, ten feet wide, before reaching the edge of the street, from which point he was precipitated down the embankment. There was no snow in the street, but some snow and mud in the gutter; but the stones in the gutter could be readily seen by daylight. Evidently he supposed that he was nearly opposite the house of Mrs. McCusick, his place of destination; but in driving, or permitting his horse to turn, from the main track too soon, and allowing him to go too far, the accident occurred only a few feet from Mrs. McCusick's house. The plaintiff's familiarity with the street, the McCusick house, and the embankment, and the manner in which the horse was managed, were important factors in the case, all of which were admitted; and all the facts appearing show conclusively that plaintiff was guilty of negligence in his conduct, resulting in being precipitated down the embankment, and which caused the injury. If he saw fit, on a dark night, as this was, to encounter the risk of going with his horse and wagon to Mrs. McCusick's house, and thus pass beyond the limits of a properly and skillfully graded street, without any latent or patent defects in it, and the injuries received were beyond the line of such street, we do not think the city liable.

This court has already held in the case of Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. Rep. 271, that a city is under no obligation to light its streets, and a mere neglect to do so is not a ground of liability, unless the charter expressly imposes the duty. This is the general rule, and, if there are exceptions, the facts herein do not bring this case within the exception. Nor are towns necessarily bound to fence, or erect barriers, to prevent travelers from getting outside of the road or way. 2 Dill. Mun. Corp. (4th Ed.), section 1005. The reason for the rule is well stated, in cases of this kind, in Sparhawk v. City of Salem, 1 Allen, 30, as follows: "It appears that the highway in question was safe and convenient for travelers throughout its entire width, and the land adjoining it was also safe and convenient to travel upon. After getting entirely outside the highway in safety, the traveler must proceed still further in order to reach a dangerous place. If he reached that place, and was injured, the want of a railing was remotely, and not immediately, connected with the injury. If cities and towns are bound to protect travelers against such dangers, by erecting railings to prevent them from straying out of the highway, it is difficult to see the limit of their liability. In passing over an unfenced plain in the nighttime, the traveler might stray away from the road to a great distance, at the risk of the town, unless they fenced in their whole highway; or he might, by mistake, enter a private way, or an open space, such as is often let about a farmhouse, or a large public common, or an unfenced forest, and hold the town responsible for any injury he might receive there, because they had not fenced against the private way, or open space, or common or forest. Indeed, they would be liable to him for any injury he might receive from coming in collision with any building or structure in the city by straying beyond the limits of a street in the dark, unless they provided railings along all their public streets." Considering the fact that Burgess street, in its entire width of sixty feet, was graded and in good condition; that plaintiff was well acquainted with the neighborhood; that he turned his horse purposely, or allowed him to turn, at right angles with the street, and had to pass over the gutter and sidewalk before reaching the embankment—and all the other attending circumstances, we are of the opinion that the trial court was fully justified in directing a verdict for the defendant and denying the motion for a new trial.

IMPUTED WRONG AS THE SAME AFFECTS RAILWAY LAW.

There are two notable instances wherein the act of one is imputed to another in railway law. The first is the case of the negligence of the parent or custodian of a minor being imputed to the minor. And the other is where the wrongful, malicious act of the employee is imputed to the master so as to subject the master to exemplary damages. In the case of the minor, there are four different aspects in which the subject may present itself. First. Where the action is by the minor suing by next friend (*prochein armi*). Second. Where the action is brought by the administrator of the deceased minor. Third. Where the action is in the name of and for the benefit of the parent of the minor. Fourth. This is a statutory action brought by the administrator of the minor; in which action the administrator sues, not only in right of the intestate, but also in right of the next of kin, "and the damages are assessed in view of both aspects of the case."[1] In all

[1] Walters v. R. Co., 41 Iowa, 71; Hartfield v. Roper, 21 Wend. 615; Kay v. R. Co., 3 Am. Rep. 628; Grant v. Fitzburg, 39 Am. St. Rep. 450; Wymore v. Mahaska Co., 78 Iowa, 396; Railway Co. v. Crawford, 28 Ohio St. 641; City of Chicago v. Major, 68 Am. Dec. 558; City of Chicago v. Starr, 89 Am. Dec. 422; Wiswill v. Doyle, 160 Mass. 42; Westerfield v. Levis, 43 La. Ann. 64; Whirley v. Whitman, 1 Head, 610; Rail

these cases there are only two titles asserted, the one is an action for the damages suffered by the child, and which passes to others by right of inheritance, in case of the death of the child; and the other is an action for damages suffered by the parents on account of the loss of the child, or an action by the parents for the loss of the child's services. There is the child's right for damages suffered by the child, and the parents' right for damages suffered by the parent in the loss of the child or its services, and these two rights may present themselves in the four different aspects above mentioned. And there is still another point of view from which the case might be considered; this is where a minor has neither father nor mother, but is under the care, control, maintenance and protection of its next of kin, its near relatives, and one of these protectors is guilty of contributory negligence with respect to the child, that element of a sole beneficiary being guilty of contributory negligence, does not exist, but it is a case of contributory negligence on the part of one of several joint beneficiaries. Many of the decided cases—and the view is endorsed by some of the ablest and most recent text-writers—hold that where a sole beneficiary sues as administrator to the child, the contributory negligence of such a one is a good defense on the merits, as where a parent guilty of contributory negligence, sues as administrator of the child, for an injury causing the death of the child. And some of the cases, heretofore cited, go further, and hold that the fact of the sole beneficiary, who is guilty of contributory negligence, suing as administrator to the child, is immaterial, is but a matter of mere form of procedure. And that it matters not who fills the office of administrator, that if there be only one beneficiary, and such beneficiary be guilty of contributory negligence, then that such negligence is a defense on the merits. If this be true, then by a parity of reasoning, if one of several joint beneficiaries be guilty of contributory negligence, this negligence should be a defense on the merits. Because it is an old and well established rule of pleading, that where a joint right of recovery is asserted, the recovery must be joint.[2] It is not true as asserted by some authorities, that the statute gives the right of action to the personal representative in all respects the same as if the party injured himself had sued. Because the best considered authorities hold that where a sole beneficiary guilty of contributory negligence, sues as administrator to the deceased minor, that the contributory negligence of such an one is a defense on the merits. All that can be said is, that the statute gives to the personal representatives of the minor, the same right that the minor had, but the enforcement of that right by the administrator may be attended by circumstances different from those which would have existed, had the minor himself sued.[3] Where a minor is so young that he cannot be held liable for contributory negligence, the question arises whether he can or should stand chargeable with the contributory negligence of his parent or guardian—custodian. This is a question of no little importance to the great railroad systems that belt this union with bands of iron. These corporations have become a public necessity to the commercial, business and governmental interests of the people, and whilst these organizations are formed by private individuals for private gain, still they are of a *quasi*-public nature, and the public are concerned in their management and operation. Hot or cold, wet or dry, railroad trains must be run; they have come under an obligation to the public, and this obligation lays on them duties which do not belong to a mere private enterprise. The running of railroad trains is always attended with more or less danger, they are not easily controlled, not readily stopped when once started, but the necessities of rapid transportation demands that these corporations shall run their trains with speed. This rapid speed increases the danger to railroad employees and to passengers; a railroad train and a railroad track is a place of danger—a red flag may be considered as always floating from a train or waiving from a track. Now, then, if a young child, through the negligence of its parents or custodian, is suffered to wander on a railroad

road Co. v. Robinson, 18 N. E. Rep. 772; Bottoms v. R. Co. (N. C.), 25, 41 Am. St. Rep. 799; Nisbit v. Town of Garner (Iowa), 1 L. R. A. 153; Loague v. Railroad, 91 Tenn. 461; Railroad Co. v. Grasecloocs' Admr. (Va.), 13 S. E. Rep. 454; Glassey v. Railway Co., 57 Pa. St. 172; Westerberg v. R. Co. (Pa.), 24 Am. St. Rep. 510; Whart. Neg. 312-314; Bishop, Non-con. Law, § 582.

[2] Chitty on Pld., vol. 1, p. 79; Gould on Pld. p. 230.

[3] Loague v. Railroad, 91 Tenn. 461; Grant v. City Fitzburg, 160 Mass. 160; Wiswill v. Doyle, 160 Mass. 107.

track, in front of a rapidly moving train, and is injured or killed, should the railroad be dealt with as though the minor and its parents were free from fault? Shall the parents, but for whose negligence the child would not have been hurt, shall the very parties whose negligence was the direct and proximate cause of the misfortune, be allowed to recover heavy damages against the corporation for the results of their acknowledged negligence? If such is the law, then the law is in conflict with natural justice. Mr. Bishop in his work on Noncontract Law, takes strong position on this subject against the railroad, and says that the negligence of the parent should not be imputed to the minor, and says that the law never took away a child's property because its father was a scoundrel, poor or shiftless. But this has nothing to do with the matter, the two cases are not parallel; the question here is shall an individual profit by an act of which he was the proximate cause. I have never heard of anyone proposing to take a child's property because its father was a scoundrel. Mr. Bishop may know of such cases, but he does not cite any authorities to that effect. And until he does I cannot give up my convictions, especially in the light of the arguments he makes.

Mr. Beach in his work on Contributory Negligence says that the doctrine of the imputability of the parents' negligence to the minor is an anomaly, and in striking contrast with the case of a donkey, exposed on the highway and negligently run down and injured, or with oysters in the bed of a river, injured by the negligent operation of the vessel, in both of which cases actions have been sustained, and he adds that if the child were an ass or an oyster, he would secure a protection, denied him as a human being. The learned author certainly will not contend, that the two cases are parallel. To make the parallel, there must be two persons, one guilty of the negligence and the other suing, to which last person, the plaintiff, the negligence of the first is proposed to be imputed. In Mr. Beach's case, we have the master at one end of the line and an ass at the other end, this is the parallel he makes. We are told by the advocates of the doctrine of the non-imputability of negligence to minors, that the minor has done no wrong, that his tender years forbids the supposition that he is chargeable either with his own negligence or with the negligence of others.[4] But let these same gentlemen who are prone to use such strong language, when speaking of the doctrine to which they are opposed—I say, let these gentlemen remember, that the minor is asserting a right founded on the negligence of those who are responsible for his conduct, yes, the minor is asserting a right founded on the culpable negligence of those who are his keepers and custodians by birth and by blood. A low and depraved parent could willfully expose his own offspring to danger and death, and make profit from the transaction, nay even, this doctrine allows the guilty parent to go from the temple of justice with the price of his iniquity in his bloody hands. The opposers of imputing to the minor the negligence of the parent virtually abandon their position when they decide that the negligence of the parent is a bar in a suit by the administrator of the minor, when the parent is the sole beneficiary. They say, to allow the parent to recover in such case, despite his negligence, would be to allow him to take advantage of his own wrong directly.[5] These respectable authorities then hold, that contributory negligence is a defense when to deny or refuse the same would be to allow a party to take advantage of his own wrong. If a parent through his negligence suffers his child to get injured by a railway train, and then brings suit in his own name as parent for the loss of the child or his services, and recovers damages therefor, is he not taking advantage of his own wrong? And in all cases where a parent sues for an injury, when his negligence was the proximate cause of that injury and recovers damages of the defendant, is he not taking advantage of his own wrong? The law will not allow that to be done indirectly, which it will not allow done directly.[6] And if the parent cannot directly take advantage of his own wrong, he will not be allowed to indirectly do that which he

[4] Nisbet v. Town of Garner, 1 L. R. A. 155; Whirley v. Whitman, 1 Head. 610; Railroad Co. v. Wilcox, 8 L. R. A. 494; Kay v. Railroad Co., 3 Am. Rep. 629; Railway Co. v. Crawford, 24 Ohio St. 641.

[5] Grant v. City of Fitzburg, 160 Mass. 160; Glassey v. Railway Co., 57 Pa. St. 172; Wiswill v. Doyle, 29 Am. St. Rep. 451; Bottoms v. R. Co. (N. C.), 25, 41 Am. St. Rep. 799; Burger v. R. Co., 112 Mo. 249; Ridenbrur v. R. Co., 102 Mo. 286; Bluedorn v. Railway Co., 121 Mo. 268; Pat. Ry. Acc. Law, § 72; Pol. Torts, § 299; Cooley, Torts, § 681; 2 Thompson Neg. § 1184.

[6] Blackstone's Comm. vol. 2, p. 154.

cannot do directly. The minor's title, in the case supposed, is founded on the negligence of another. You cannot separate his title from this negligence. Negligence is a link in his chain, and a link which will snap whenever the "plummet is laid to the line." Estoppel by matter *in pais* is a wholesome doctrine. In fact it comes about as near enforcing the golden rule of doing unto others as you would have others do to you as human rules applied to human conduct can come. And it is a wise and wholesome application of this doctrine. When the parent is prohibited from recovering either for damages suffered by the minor, or for damages he has suffered by the death or injury of the minor, when he the parent has been guilty of contributory negligence. In fact, we cannot see how it can be; for, truly, may the minor pray to be delivered from a friend, who will negligently suffer the minor to be exposed to almost certain death, and then come demanding the price of his negligence. Most of the States have statutes inflicting severe penalties on persons who carelessly or negligently cause the death of another, yet, these courts with this statute in their codes, will reward the custodian of a minor, whose negligence causes the minor's death, by suffering him to recover heavy damages against the railroad whose train has run over a child who he caused to be on the track.[7] I hope to live to see the day when this heresy will be banished from our jurisprudence, and the trend of the current of judicial thought against the doctrine of the non-imputability of the negligence of the parent or guardian to the minor. Some of the courts which have been firm supporters of the old doctrine, have driven home the entering wedge which will shatter this judicial heresy, by holding that where the parent is the sole beneficiary, in a suit brought by the administrator of the minor, the contributory negligence of such parent is, as a special plea, a bar, or in evidence on an estoppel. Such courts will be compelled to hold, that the beneficiary, or the plaintiff who is guilty of contributory negligence, or when the plaintiff claims through others who are guilty of such negligence, that such person is estopped by such negligence, reason and justice alike point to this result. As the doctrine now stands in many courts, the infant may well pray to be delivered from his friends, who claim that the parent is not estopped by his own contributory negligence. When he is the beneficiary either in his own right, or when the suit is brought by the administrator of the minor. A great deal is said about the protection of minors. Does this doctrine protect them? But it is said the law can safely rely on the parental affection to shield a minor from the danger of being exposed to danger in order that advantage may be taken of an injury to the minor. Waiving that question, we say, that both parents may be dead, but still the law; applies for parents are not the only persons that can act as custodians of minors, for some of the next of kin might be sole beneficiary of damages recovered for the minor's death, as well as custodian of the minor's person during his life.[8]

We come, now, to consider the case of the willful, malicious wrong of the employees imputed to the master, so as to make the master liable for exemplary damages. By the common law the master was not liable, to the same extent, for the trespass of the servant, even when done in the line of his employment, as for the master's own personal act. When the servant did an act which made the perpetrator thereof a trespasser and suable in an action of trespass, the master could only be sued in an action of case, that is, by the common law, the master could not be treated as a trespasser for the act of the servant even when done in the line of his employment, where the master did not authorize or ratify the servant's act. The common law only held the master liable to make compensation for the servant's act, which the master did not authorize or ratify. Whilst we find no instance of exemplary damages in the early common law, and Lord Camden's charge to the jury in the case of Wilkes v. Wood, Lofft. 1, 18, 19, contained perhaps the first clear enunciation of the right of the jury to inflict this punishment, yet the principle on which punitive damages is at this day allowed, is found in the doctrines of the common law above laid down.[9] But some modern author-

[7] Wymore v. Mahaska, 78 Iowa, 396; Westerberg v. R. Co., 24 Am. St. Rep. 510; Hartfield v. Roper, 21 Wend. 615; 4 Am. & Eng. Enc. Law, 88; Tiffany, Death by Wrongful Act, §§ 68-72.

[8] City of Chicago v. Hesing, 25 Am. Rep. 378; Walters v. R. Co., 41 Iowa, 71.

[9] McManus v. Cricket, 1 East. 108. Bourcher v.

ities have departed from this common law rule, and hold the master or principal subject to vindictive damages, especially in the case of corporations, where the act of the servant is willfully and maliciously committed, in the line of his employment, though the master may have neither ratified nor authorized the servant's act.[10] These authorities utterly ignore the question of the authorization or ratification on the part of the master of the servant's act; either this, or they make the act itself supply these necessary elements to the assessment of vindictive damages. But the decisions of these courts give no indication that they make any such inferences, and they declare in plain terms that if the injurious act of the employee was willfully or maliciously committed in the line of his employment, the master is liable to punitive damages, without anything else being shown.[11] On the other hand, there is a very able line of authorities, which hold that the master is not liable to exemplary damages for the malicious act of the servant, unless he authorized or ratified such act. There must be something done or forborne by the master showing a personal willingness that the act shall be done, to the extent of authorizing the act—or an approval and ratification of the act when done; and no mere act of the servant separate and alone, can supply these necessary elements. If the servant committed the act, of his own volition, without the master's consent or approval, however malicious and even injurious the act may be, the master is not liable to vindictive damages.[12] There may be circumstances under which the master will be liable for act of the servant to the extent of punitive damages though no authorization or ratification on the part of the master can be shown. Thus, if the master employ the servant about a business and the natural and proximate result of the performance of that work by the servant is great damage to a third person, the master will be liable to punitive damages, if the servant perform the work and do great damage thereby to a third person. The reason of this is obvious. The master knew when he set the servant about the work that the natural and proximate result of the performance of that work by the servant would be great injury to another. Knowing this he is responsible for punitive damages, although he may have had no knowledge of, and may not have approved, the particular act which caused the injury.[13] No man should be punished for the act of another, for an act which he did not do. It shocks our sense of justice when any one is punished for an act which he did not authorize or approve. Turn to the criminal law—how stands the matter? Is not the intent the very essence of the offense. I know of no case wherein the law ignores the intent, except in some peculiar statutes, like those against the unlawful sale of liquor, and in the common law distinction between actions of trespass and actions on the case. In all other cases so far as my knowledge extends, the intent is the very gist of the offense. A criminal is not punished unless he intended to commit the offense. Intent includes personal knowledge—that is, the criminal authorized himself to commit the offense, if we may so speak.[14] We have said that those courts which hold to the doctrine of imputed liability, so far as the same concerns exemplary damages, are especially prone to so hold in the case of corporations. They seem to go on Lord Coke's idea, that a corporation has no soul, has no personal sense that can be reached, and on account of what they call the "logical difficulty" of showing a personal authorization or ratification on the part of the corporation, they make such authorization and ratification a presumption of law, or else hold the same to be unnecessary. But there is no more difficulty of showing a personal authority or approval

Noldstrom, 1 Taunton, 568. Chitty says, unless there be an actual consent to the trespass, either after or before it was committed, even a master is not liable in an action of trespass for the act of his servant, though case may be supported against him in some instances for injuries in respect of which the servant is liable in trespass. Chitty's Pld., vol. 1, p. 137.

[10] Hachl v. Wabash R. Co., 24 S. W. Rep. 737; Vawter v. Hatz, 112 Mo. 633; Hopkins v. St. & St. L. R. Co., 36 N. H. 9. Fay v. Parker, 53 N. H. 342; Goddard v. Grand Trunk R. Co., 57 Me. 202.

[11] Rouse v. R. Co., 41 Mo. App. 298; Smith v. R. Co., 92 Mo. 359; Dixby v. Dunlap, 56 N. H. 456.

[12] Hogan v. P. & W. Ry. Co., 3 R. L. 88; Philadelphia R. Co. v. Quigley, 21 How. 202; Salt Lake City v. Hollister, 118 U. S. 256; Reed v. Home Savings Bank, 130 Mass. 443; Krulivitz v. Easter R. Co., 140, 573; Dermott v. Evening Journal, 14 Vroom. 488; Bank of New South Wales v. Owston, 4 App. Cas. 270; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282.

[13] Whittaker's Smith on Negligence, p. 137; Cooley on Torts, p. 212; Lothrop v. Adams, 133, Mass. 471; Denver, etc. R. Co. v. Harris, 122 U. S. 597.

[14] Chitty on Pld., Vol. 1 p. 435; Blackstone's Comm. Vol. 4, p. 110.

on the part of a corporation, than there is in the case of a private individual. Because whenever an employees has other employees under his management and control, with power to hire and discharge and also has charge of the work being done, notice to such an employee, as it affects the conduct of the servants under his control is notice to the corporation. Such a servant stands in the shoes of and represents the corporation, so far as the acts of the men under his charge in the performance of their work, is concerned.[15] Upon what grounds does the doctrine of exemplary damages rest. How do courts justify the awarding of damages beyond compensation for the act done? In the case of Haines v. Schultz the Supreme Court of New Jersey said speaking of punitive damages "that the right to award such damages rests primarily on the single ground of wrongful motive. It is the wrongful personal intention to injure that calls for the penalty. To this wrongful intent knowledge is an essential prerequisite." It is generally said, that to justify the infliction of punitive damages there must be circumstances of willful oppression, malice or fraud. But there can be no willful oppression, malice or fraud, without the wrongful personal intent, and there can be no such intent without knowlenge, a man cannot intend a thing without knowing it. Compensation is one thing and exemplary damages is quite another and different thing. The right to compensation rests alone on the ground of injury; it is to compel the defendant to restore to the plaintiff that which he, the defendant, has deprived him, the plaintiff, of; the intent with which the act was done plays no part in the penalty. As said by Mr. Chitty "a person may become an immediate trespasser *vi et armes*, even in the performance of a lawful act, if in the course of such performance he be guilty of neglect."[16]

But in the case of punitive damages the idea is that the defendant has not only injured the individual, but he has been guilty of an act, which for the public good, in order that other evil disposed persons may be deterred from doing likewise needs punishment by the infliction of punitive damages on the defendant, and then, by a species of legal legerdemain, the plaintiff is subrogated to this public right and thereby recovers smart money of the defendant. It is contrary to the fundamental principles on which damages are allowed to hold the master for exemplary damages when he neither ratified or approved the servant's act. What is this fundamental principle on which damages are allowed? It is this, that the defendant is liable to such damages as may reasonably be presumed to have been in the minds of the parties, as the result of the transaction, or as the matter is sometimes put in reference to the defendant's liability to injuries resulting from negligence, "that is, the defendant is liable, if in view of all the facts and circumstances, at the time, such injuries might reasonably have been foreseen as likely to ensue from the alleged negligence," the other elements of liability being present.[17] Now, how can the defendant be presumed or thought to have contemplated the result of an injury, when he had no knowledge of the act which caused the injury. How could the defendant intend that which he knew not of.[18] Again, the injury which is the result of the servant's act, springs from a tort. Yet the courts which hold to the doctrine of the master's liability though he neither authorized or approved the servant's act, proceed on the principles of the contract of insurance, that is, they hold the master liable to punitive damages at all events, that is, they hold, that if the malicious and injurious act was done by the servant in the course of his employment, the master is liable, though the master neither authorized nor approved the servant's conduct. This doctrine makes the master an insurer of the servant's conduct, and a declaration might well be drawn for such damages, as if the pleader were declaring on a contract of insurance, that is, he would only be required to allege the malicious injury and that the same occurred or was done by the servant in the line of his employment, and the master's liability would follow as a legal consequence. But the better doctrine, as held by the best considered cases,

[15] Cleghorn v. N. Y. Central R. Co., N. Y. 44; Howe v. Newmarch, 12 Allen, 49; Ramsden v. Boston Ry. Co., 104 Mass. 117; Regina v. Holbrok, 3 A. B. D. 60; Kennon v. Gilmer, 131 U. S. 22.

[16] Chitty on Pld., Vol. 1 p. 128; Underwood v. Hewson, 1 Str. 596; Scott v. Shepherd, 3 Wills, 411.

[17] Texas & P. R. Co. v. Reed, 31 S. W. Rep. 1059; Sharp v. Powell, L. R. 7 C. P. 253; Railway Co. v. Williams, 75 Texas, 4.

[18] Whittaker's Smith on Negligence, 471.

as I think, hold that a declaration so drawn would show no liability on the part of the master to exemplary damages; but to be good and proof against a demurrer, such a declaration would be required to go a step farther in its averments, and allege in an issuable form, either that the master authorized the servant's act, or ratified and approved the same afterwards.[19] When we come to carefully consider the doctrine of the liability of the master for the malicious act of the servant, to the extent of the infliction of punitive damages on the master, though he may neither have ratified nor authorized such act, and especially when we consider how variant such a doctrine is from the common law, the source of our jurisprudence; and lastly, when we consider how violative this doctrine is of all right and justice, we can only feel deep regret and profound astonishment that such a principle ever found an advocate on the supreme bench of any State of this Union. LINTON D. LANDRUM.

[19] Chitty on Pld., 16th Ed. Vol. 1, 478; Denver Ry. Co. v. Harris, 122 U. S. 597; National Bank v. Graham, 100 U. S. 699; Krulevitz v. Eastern R. Co., 140 Mass. 573.

NEGOTIABLE INSTRUMENT—NOTE—PAYABLE TO MAKER—BLANK INDORSEMENT OF THIRD PERSON—PAROL EVIDENCE.

EWAN v. BROOKS-WATERFIELD CO.

Supreme Court of Ohio, January, 26, 1897.

1. The indorsement of the maker's name on the back of a promissory note payable to his order, and its delivery in that form to another for value, are essential parts of the execution of the note, which then becomes, in legal effect, payable to the holder or bearer; but the maker does not thereby become an indorser in the legal sense of the term, nor contract any liability but that of a maker.

2. The undertaking of a third person who places his name in blank on the back of such a note before or at the time it is so delivered by the maker, rests upon the consideration which supports the note in the hands of the holder, and *prima facie* is that of a surety of the maker for the payment of the note; and he will be held accordingly, unless he can show a different understanding or agreement between the parties, which it is competent for him to do.

WILLIAMS, C. J.: The allegations of the answer, that the Brooks-Waterfield Company, by signing its name on the back of the note, assumed the position of an indorser, is an admission of the due execution of the note, and of the genuineness of the company's signature thereon; but the nature of the obligation the company thus contracted must be determined from the facts attending the transaction, which, as shown by the record, are substantially that the name of the company was signed on the back of the note when it was delivered to the plaintiff, and it was purchased and received by her from the maker on the day of its date, without information of any agreement concerning the company's obligation, other than that derived from the note itself. The note, being payable to the order of the maker, was incomplete in its execution until indorsed by him, and delivered to another for value; and it was so indorsed when received by the plaintiff, who paid to the maker its full value. The execution of the note being thus completed, it then, for the first time, became a valid obligation, and, in legal effect, was payable to the plaintiff or bearer. At that time it bore the signature of the company written on its back. There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it, in order to transfer the title. If the company had thus become the indorsee, the note, in due course of business, could only have found its way back into the hands of the maker upon its surrender on payment or other satisfactory discharge, and its indorsement by the company on such surrender would be so entirely out of the usual course of business as to raise a presumption against it. The note being found in the hands of Cox on the day of its date, with the company's name indorsed upon it, is inconsistent with the theory that it had been indorsed and transferred to the company as the owner of the note, or that it had been taken up by payment. A more reasonable inference would be, that the note was then in the maker's hands, with authority from the company to negotiate it for his accommodation. "If a holder produce a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument." Good v. Martin, 95 U. S. 90. So that, upon presentation of this note to the plaintiff, she was authorized to deal with it as belonging to Cox, with the signature of the company indorsed thereon at the time of its execution, in order to give it credit, and aid in its negotiation; she not having been informed of any different agreement or understanding between the parties.

Precisely what is the nature of the legal obligation contracted by a stranger who indorses his name in blank on the back of a negotiable promissory note before or at the time it takes effect is a question upon which the courts have widely differed; some holding that his obligation is that of a second indorser; others have held him liable as a guarantor; and still others as a maker with the rights of a surety. The rule established in this State is that, when the name of such third party appears upon the note at the time it takes effect, his undertaking rests upon the consideration which supports the note; and the presump-

tion is he intended to be liable as a surety for its payment, and is held accordingly, unless he can show that there was a different agreement or understanding between the parties, which it is competent for him to do. Bright v. Carpenter, 9 Ohio, 139; Champion v. Griffith, 13 Ohio, 228; Robinson v. Abell, 17 Ohio, 36; Seymour v. Leyman, 10 Ohio St. 284; Seymour v. Mickey, 15 Ohio St. 615; Castle v. Rickly, 44 Ohio St. 490, 9 N. E. Rep. 136. And it is said in Rand. Com. Paper, § 831, that "the view which finds most support is probably that which holds the indorsement of a negotiable note by a stranger before or at the time of its delivery to the payee to be *prima facie* an original undertaking as joint maker, with an implied liability as such to the payee and all holders for value." The present case must be governed by this rule, unless it is rendered inapplicable by the fact that the note in suit is payable to the order of the maker, and his name appears indorsed thereon above that of the defendant in error. There are cases in which that distinction is made. Bigelow v. Colton, 13 Gray, 309; Dubois v. Mason, 127 Mass. 37; Bank v. Payne, 111 Mo. 291, 20 S. W. Rep. 41; Bank v. Nordgren, 157 Ill. 663, 42 N. E. Rep. 148. These decisions are placed upon the grounds that the liability of the parties whose names appear on the back of a negotiable note is conclusively determined by the position of the signatures with reference to those of the other parties when the note takes effect, and that, as a note payable to the maker's order cannot take effect until indorsed by him, a third person, in placing his name on the back of the note previous to its indorsement by the maker, intends to become liable only as a second indorser. He understands that to be the nature of his liability, it is said, and a different intention or agreement cannot be shown by parol proof. In one of the cases (Bank v. Nordgren, *supra*), the reason of the decision is stated as follows: "Inasmuch as the note can never have validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser; and it is reasonable to conclude that such was the position which he intended to occupy."

The real foundation on which these decisions appear to rest is that the maker, by placing his name on the back of the note to give it effect, becomes the first indorser, and the third person who places his signature on it, though done before that of the maker is indorsed on it, contracts the obligation of a second indorser. It is undoubtedly true that such a note is without any validity so long as it remains in the hands of the maker, and its indorsement and transfer by him to a holder for value is necessary to give it obligatory effect. But it is equally true that by indorsing his name on the back of the note, and delivering it in that form to the holder, the maker does not become an indorser, in the commercial acceptation of that term. He is, nevertheless, the maker of the note, his signature on its back being an essential part of its execution, and his liability is that of a maker only. He does not thereby enter into the contract of an indorser, which is to pay the note if the maker, upon demand, fail to do so at maturity, and due notice thereof be given. It would be a useless ceremony, if not a palpable absurdity to require the holder to make demand of the maker, and give him notice of his own default in order to charge him with the payment of the note. He is liable as a maker, without demand and notice, and sustains no other legal relation to the paper, which, it must be presumed, is within the knowledge of third persons who place their names on the note while in the maker's hands. It is no less true that such third person, whose name appears on the back of a note of that kind before or at the time its execution is completed by the indorsement of the maker's name thereon, is not an indorser, in the proper and legal sense of the term. There is a popular sense in which the term is used, that is sufficiently comprehensive to include any person who lends his name in any form to another on commercial paper. But courts do not use it in that sense. In its well-understood legal and commercial meaning, the indorsement of a note in blank amounts to a contract on the part of the indorser, with and in favor of the indorsee and every subsequent holder to whom the note is transferred, that the indorser had a good title to the instrument at the time of its indorsement, and was competent to transfer that title, which he undertook to do by the indorsement and delivery of the instrument to his indorsee; so that, to give rise to the contract and relation of an indorser, it is necessary that he should have been the payee or indorsee of the paper. Beckwith v. Angell, 6 Conn. 317; Story, Prom. Notes, § 135. Hence neither the indorsement of the maker's name on the back of a note payable to his order to complete its execution, nor that of a third person in blank before or at the time of its execution and delivery, constitutes a regular indorsement of commercial paper, nor creates the contract arising from a regular indorsement in blank, the terms of which are distinctly defined by law, and are therefore not subject to be varied by parol. The indorsement of the third person in such case belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties; and, being ambiguous in that respect, parol evidence becomes admissible to show the terms of the agreement as actually made by the parties, or other facts showing their intention at the time.

The assumption that the stranger who places his name in blank on the back of a negotiable note, payable to the order of the maker, intends to contract as a second indorser, is based upon the consideration that he knows the note cannot become effectual without the indorsement thereon of the maker's name. But he must also know the latter does not become the first indorser, nor

contract the liability of an indorser at all, and that his own signature placed on the note before or at the time of its delivery creates no such contract; and, since he does not thereby contract the liability of a regular indorser, the presumption that he did not intend to do so would be quite as reasonable and legitimate as that he intended to do what he knew his act would not accomplish. It is not doubted that such third person may, by proper stipulation, prescribe the extent of the liability he intends to incur by his indorsement, and make it that of a second indorser, or whatever else he chooses; but, in the absence of such stipulation, the nature of his undertaking, like that of other irregular indorsers, must be determined from the circumstances of the case. That neither the order in which the names appear on the back of the paper, nor the order in point of time in which they were placed there, is conclusive of the relation of the parties to the paper, or to each other, or the liability incurred where the paper is for the accommodation of the maker, was held in the early case of Douglas v. Waddle, 1 Ohio, 413, and in the late case of Castle v. Rickly, 44 Ohio St. 490, 9 N. E. Rep. 136. In the first case, a note drawn by Barnes, payable to the order of Waddle, was indorsed by Waddle, and afterwards by Douglass, and then discounted for the maker's benefit. Douglass paid half of the note after maturity, and sued Waddle for reimbursement, claiming that, as second indorser, he had recourse on Waddle, the first indorser, and that parol evidence was inadmissible to show any different relation between the parties. But the court sustained Waddle in his claim that, as the indorsements were made before the discount of the paper, to give it credit, for the maker's accommodation, the obligation of Waddle and Douglass was that of cosureties for the maker, and therefore Douglass, having paid no more than his share of the debt, was not entitled to recover against Waddle. The court say that: "When a note is indorsed and transferred by a payee, the indorsement is an actual contract between the indorser and indorsee of the note, that the latter received it for a consideration paid, and therefore the indorsement, like the making, is evidence of a debt due from the indorser to the indorsee, and the former is bound to pay if the maker, upon demand, fails to do so, and the requisite notice is given the indorser. But when the transaction between the parties is different, when it is a mere accommodation transaction, neither the reason of the rule nor the justice of the case admits of its application." And the court further say that "Douglass knew that Waddle did not in fact own the note, but had indorsed it for the accommodation of Barnes, as surety. He knew that he himself indorsed it for the same purpose, and not as owner. It was intended to pay a debt due from Barnes, who, and not Waddle, was the person benefited. Douglass himself never had a beneficial interest in the note, and the money paid by him was paid for Barnes." So, it may be said in this case, the defendant in error must have known when it placed its name on the back of the note in suit, while in the hands of Cox, that its indorsement by him could have no other effect than to complete its execution, and that he would not thereby become a regular indorser of the paper, and that the defendant in error was not the owner of the note, nor had any beneficial interest in it, and therefore could not, and did not, become a regular indorser, but that the effect of its signature on the note was to give it credit, and enable Cox to negotiate it for his benefit. Speaking of irregular indorsements of this character, and of the understanding of parties to them, the court, in Douglass v. Waddle, *supra*, said: "In this country the parties to this description of paper have usually understood their relation to be that of principal and surety, and, upon this understanding, have generally acted both in creating the paper and adjusting their liabilities upon it." And in Rand. Com. Paper, § 888, that author says: "That in a great majority of instances the purpose of all the original parties to such irregular indorsements was to furnish additional security, by way of guarantor or surety, to the actual or nominal payee."

That the defendant in error intended and understood its liability to be that of a surety, and not of a second indorser, is manifest from its subsequent conduct. The payment of $500 on the note by the defendant in error was made long after the maturity of the note, and after the failure to make the demand and give the notice necessary to charge the company as an indorser. It then was aware that, if its liability originally was that of an indorser only, that liability had ceased; and it was under no obligation to make any payment to the plaintiff. It is not to be supposed that the check was given the plaintiff as a gratuity. The evidence shows it was a payment on the note, which is a recognition of the validity of the demand. The payment, therefore, is at variance with the claim that the liability of the company was conditional, dependent upon proper demand and notice, and amounts to an unequivocal acknowledgment of an absolute and unconditional liability at the time of payment. And this construction by the defendant in error of its obligation is in harmony with what we have considered it to be, both on principle and in view of the former adjudications of the court—that of a surety for the payment of the note. This conclusion has not been reached without a careful consideration of the cases which hold otherwise. But we have found ourselves unable to concur in their holdings, reluctant as we are to differ with the courts by which they were decided, and desirable as it is that there should be uniformity of decision on so important a question of commercial law. Judgment reversed.

NOTE.—It is generally held that a person who indorses a bill or note payable to order at a time when he is not the payee or holder, is not strictly an indorser. He is generally called a *quasi*-indorser and

his act an irregular or an anomalous indorsement. In a few of the States, as well as in England, he *prima facie* incurs the liability of an indorser, but parol evidence is admissible of the intention of the parties which, when ascertained, determines his liability. 4 Lawson's Rights & Remedies, p. 2735, citing Coulter v. Richmond, 59 N. Y. 478; Jaffray v. Brown, 74 N. Y. 393; Browning v. Merritt, 61 Ind. 425; Cady v. Shepard, 12 Wis. 639; Eibert v. Finkbeimer, 68 Pa. St. 243; Meyer v. Hibsher, 47 N. Y. 279; Myrick v. Hasey, 27 Me. 9; Jones v. Goodwin, 39 Cal. 493; Hooks v. Anderson, 58 Ala. 238; Dubois v. Mason, 127 Mass. 37; Keyser v. Hall, 85 Ill. 511; Smith v. Long, 40 Mich. 555. But by the weight of authority he is liable as a joint promisor or comaker if he indorses the note before it was issued, and it is so presumed; but if shown to have indorsed it after its issue, he is liable as a guarantor; but in both cases evidence is admissible of the real intention of the parties, which, when ascertained, determines his liability. Union Bank v. Willis, 8 Met. 504; Good v. Martin, 95 U. S. 90; Carpenter v. McLaughlin, 12 R. I. 270; Stein v. Passmore, 25 Minn. 256; Herbage v. McEntee, 40 Mich. 337; Chafee v. R. R. Co., 64 Mo. 193; Sylvester v. Donner, 20 Vt. 555; Harris v. Brooks, 21 Pick. 195; Martin v. Boyd, 11 N. H. 385; Stagg v. Limenfelser, 59 Mo. 342; Houghton v. Ely, 26 Wis. 181; Wright v. Remington, 41 N. J. L. 48; Irvine v. Adams, 48 Wis. 468; Kealing v. Vanskickle, 74 Ind. 529; Benton v. Hansford, 10 W. Va. 470; Rothschild v. Grix, 31 Mich. 150; National Pemberton Bank v. Longee, 108 Mass. 371. Some courts, however, hold evidence inadmissible to vary the contract thus implied by law. Allen v. Brown, 124 Mass. 77; Stack v. Beach, 74 Ind. 571. A few courts have held that the *quasi*-indorser *prima facie* incurs the liability of a guarantor (Castle v. Rickly, 44 Ohio St. 490; Ellis v. Clark, 110 Mass. 392; Riggs v. Waldo, 2 Cal. 485; Carroll v. Weed, 13 Ill. 682; Boynton v. Pierce, 79 Ill. 145; Stowell v. Raywood, 83 Ill. 120; Gillespie v. Wheeler, 46 Conn. 410; Ford v. Henderson, 34 Cal. 673; Greathead v. Walton, 40 Conn. 226; Forsyth v. Day, 46 Me. 176), while others hold that the law implies no contract whatever from such an indorsement. Chaddock v. Vanness, 35 N. J. L. 517; Crozer v. Chambers, 20 N. J. L. 256. One who puts his name on the back of a note payable to the order of another, on the condition that he is only to be liable as second indorser, cannot be held by the payee as joint maker if the payee subsequently indorses it above his name. Grensel v. Hubbard, 51 Mich. 95.

Recent Cases on the Subject.—Gen. St. Conn. sec. 1800, provides that "the blank indorsement of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee, before or after its indorsement by the payee, shall import the contract of an ordinary indorsement * * * as between such indorser and the payee or subsequent holders." Held that, where such an indorsement is made in the presence of the maker and payee before delivery, and there is no conversation in relation thereto, and no evidence of an agreement different from that implied by law, parol evidence cannot be admitted to vary or explain it. Spencer v. Allerton, 22 Atl. Rep. 778, 60 Conn. 410. The doctrine that when a person not a party to a note puts his name upon it before delivery he thereby makes himself an original promisor does not apply to a note payable to the maker, and indorsed before indorsement or negotiation by the maker. First Nat. Bank v. Payne (Mo. Sup.), 20 S. W. Rep. 41. No understanding between parties making and indorsing a note, that those indorsing it shall be liable only as guarantors, will avail against the payee, unless before delivery of the note he knows o such understanding. Long v. Campbell, 17 S. E. Rep. 197, 37 W. Va. 665. A person, not an original party to a note, by signing on the back thereof, becomes a guarantor, rather than a joint maker. Burnham v. Gosnell, 47 Mo. App. 637. A person other than a payee, who signs his name in blank upon the back of a promissory note at the time of its execution, and before its delivery to the payee, is, as to a subsequent *bona fide* holder for value, liable thereon as a joint maker, and not an accommodation indorser. Salisbury v. First Nat. Bank, 57 N. W. Rep. 727, 37 Neb. 872. Where one signs his name on the back of a note before delivery, for the purpose of giving it credit, he cannot show by parol that his agreement was that of indorser, and not of maker, though he was indorser of a prior note, for which this note was substituted. Dennis v. Jackson (Minn.), 59 N. W. Rep. 198. Where one not named as payee puts his name on the back of a note before delivery, he is liable as an original promisor, where credit is given on the faith thereof. McCallum v. Driggs (Fla.), 17 South. Rep. 407. An indorser of a note before delivery is liable to the holder thereof as a joint maker. Provident Savings Life Assur. Soc. v. Edmonds (Tenn.), 31 S. W. Rep. 168. Where a person, not the payee of the note, indorses it in blank before delivery by the maker, he is liable as surety. Barton v. American Nat. Bank (Tex. Civ. App.), 29 S. W. Rep. 210. Persons who, before delivery, sign on the back of a note, the interest for which is payable in advance, the following agreement: "Waiving demand and notice, we hereby indorse and guaranty the full payment of the within note; future payments of principal or of interest in renewal thereof ;not releasing us as indorsers,"—are joint makers of the note. Jackson Bank v. Irons (R. I.), 30 Atl. Rep. 420. Where a person, not the payee of the note, indorse his name in blank, parol evidence is admissible to show whether he signed as a surety or an indorser. Barton v. American Nat. Bank (Tex. Civ. App.), 29 S. W. Rep. 210. One, not the payee, who indorses a note before it is uttered, or indorsed by the payee, is a joint maker. Gumz v. Giegling, (Mich.), 66 N. W. Rep. 48. One who signs his name on the back of a note payable to the maker's order and by him indorsed in blank, and does so for the purpose of aiding the maker in negotiating the note, is liable as indorser, not as guarantor. Chicago Trust & Savings Bank v. Nordgren, 42 N. E. Rep. 148, 157 Ill. 663. One who writes his name on the back of a note at the time it is made is liable as a guarantor, in the absence of any agreement to the contrary. Varley v. Title Guarantee & Trust Co., 60 Ill. App. 565.

CORRESPONDENCE.

INJUNCTION AGAINST CRIME—DEBS CASE.

To the Editor of the Central Law Journal:

In your issue of Feb. 19 you publish a decision of the Court of Appeals of Texas holding that the State cannot maintain a bill to enjoin, as a common nuisance, the maintenance of a gaming house. In that case the court distinctly rules that, in order to such relief, the State must prove an injury to the property or civil rights of the public at large. In your annotation you remark that in this decision the court followed the Debs Case. It did to the extent of holding, what no well read lawyer ever doubted, that the jurisdiction of chancery to enjoin is not ousted because that sought

to be enjoined is criminal. But in the Debs Case the Supreme Court of the United States, adopting almost literally the argument of the attorney-general, held that chancery, at the suit of the sovereign to enjoin, might take cognizance of the property rights of the citizen—in this, that case was an advance upon all former adjudication. On that point it is not followed in the case referred to; nor, so far as the writer is aware, has it been by the decision of any court of last resort in any of the States. S. S. GREGORY.

Chicago, Ill.

BOOKS RECEIVED.

Handbook of the Law of Partnership. By William George, of the St. Paul Bar. St. Paul, Minn.: West Publishing Co. 1897.

The Law of Receiverships as Established and Applied in the United States, Great Britain and her Colonies. With Procedure and Forms. By John W. Smith, Esq., of the Chicago Bar. Chicago: Lawyers' Co-operative Publishing Co. Rochester, N. Y. 1897.

Handbook of the Law of Private Corporations. By Wm. L. Clark, Jr. Instructor in Law in the Catholic University of America, and Author of Hornbooks on "Criminal Law," "Criminal Procedure," and "Contracts." St. Paul, Minn. West Publishing Co. 1897.

The Historical Development of Code Pleading in England and America, with Special Reference to the Codes of New York, Missouri, California, Kentucky, Iowa, Minnesota, Indiana, Ohio, Oregon, Washington, Nebraska, Wisconsin, Kansas, Nevada, North Dakota, South Dakota, Idaho, Montana, Arizona, North Carolina, South Carolina, Arkansas, Wyoming, Utah, Colorado, Connecticut, and Oklahoma. By Charles M. Hepburn, of the Cincinnati Bar. Cincinnati: W. H. Anderson & Co. 1897.

Commentaries on the Laws of England. In Four Books. By Sir William Blackstone Knight, one of the Justices of his Majesty's Court of Common Pleas, With Notes Selected from the Editions of Archbold, Christian, Coleridge, Chitty, Stewart, Kerr, and Others; and in Addition, Notes and References to all Text Books and Decisions Wherein the Commentaries Have Been Cited, and all Statutes Modifying the Text. By William Draper Lewis, Ph. D. Dean of the Department of Law of the University of Pennsylvania. Book 3. Philadelphia: Rees, Welsh & Company. 1897.

A Treatise on the Law of Railroads, Containing a Consideration of the Organization, Status and Powers of Railroad Corporations, and of the Rights and Liabilities Incident to the Location, Construction and Operation of Railroads, and also the Duties, Rights and Liabilities of Railroad Companies as Carriers under the Rules of the Common Law and the Interstate Commerce Act. By Byron K. Elliott and William F. Elliott, Authors of Roads and Streets, Appellate Procedure and General Practice. In Four Volumes. Indianapolis and Kansas City. The Bowen-Merrill Company. 1897.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACKNOWLEDGMENT—Impeaching Mortgage Foreclosure.—A certificate of acknowledgment in proper form can be impeached only by clear and convincing proof that it is false and fraudulent.—SAGINAW BUILDING & LOAN ASSN. v. TENNANT, Mich., 69 N. W. Rep. 1118.

2. ACTION — Joinder of Causes—Joint Trespass.—Several persons guilty of a joint trespass may be sued severally, or jointly in one action.—HENRY v. CARLETON, Ala., 21 South. Rep. 225.

3. ADMINISTRATOR — Right to Maintain Action.—An administrator cannot sue to set aside a sheriff's sale under foreclosure, on the ground of fraud in the sale.—THORP v. MILLER, Mo., 38 S. W. Rep. 929.

4. ADVERSE POSSESSION.—One who has been in the open, notorious, exclusive, adverse possession of real property for 10 years becomes vested with a valid title to the same.—CITY OF FLORENCE v. WHITE, Neb., 70 N. W. Rep. 50.

5. ALIENS—Ability to Hold Land.—The alien law prohibits aliens from taking lands by devise or otherwise, except that heirs who had acquired title might hold and sell the land within three years. Section 8 provides that a resident alien, who has declared his intention to become a citizen, may take and hold real estate, and during six years dispose of it as a citizen, provided he records a certified copy of his declaration in the recorder's office. In 1891 a proviso was added to section 8, that, where a deed to land is made to an alien, he may convey to a citizen a good title, if the deed is executed before proceedings by the State to seize the land; and any deed "heretofore made" by any such alien shall have the same force against land so conveyed to an alien as if it had been made to a citizen: Held, that such proviso only applies to the class of aliens in section 8 of the act of 1887.—DE GRAFF v. WENT, Ill., 45 N. E. Rep. 1075.

6. APPEAL—Waiver of Errors.—Where an order sustaining a demurrer to the complaint, in that the action is barred by the statute of limitations, is assigned as

error on the ground that the complaint shows that the action is excepted from the operation of the statute, the question thus raised goes to the sufficiency of the facts stated in the complaint and a failure to discuss the question of sufficiency will be considered a waiver of the error.—GUY v. BLUE, Ind., 45 N. E. Rep. 1052.

7. APPEAL BOND — Liability of Sureties—Waste.—Sureties in an appeal bond against waste on certain described land cannot be held for waste on other land, on parol evidence of a misdescription.—OGDEN v. DAVIS, Cal., 47 Pac. Rep. 772.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—A description of property, in a deed of assignment, sufficient in itself, is not vitiated by a further reference, for a more particular description, to a schedule annexed, which contains no description of such property.—MANSUR & TIBBETS IMP. CO. v. WOOD, Ark., 38 S. W. Rep. 898.

9. ATTACHMENT — Intervention — Judgment.—Under Code, § 3016, providing that on intervention in attachment "the petitioner's claim shall be in a summary manner investigated. If it is found that the petitioner has title to a lien on or any interest in such property, the court shall make such order as may be necessary to protect its rights,"—the court can only pass on an intervener's claim to the property, and cannot render a money judgment against him.—VALLEY BANK OF CLARINDA v. WOLF, Iowa, 69 N. W. Rep. 1131.

10. BANKS—Collections.—The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereon. The owner of paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.—BRANCH v. UNITED STATES NAT. BANK OF OMAHA, Neb., 70 N. W. Rep. 34.

11. BANKS—Successors—Liability.—A petition of a creditor of a banking association, which discloses that another bank, as successor of said association, had assumed the liabilities upon a sufficient consideration, moving from said association, and that the claim of plaintiff was one of said liabilities remaining unpaid, states sufficient facts to entitle to relief, as against the bank which assumed the aforesaid liabilities.—TECUMSEH NAT. BANK v. BEST, Neb., 70 N. W. Rep. 41.

12. BENEVOLENT SOCIETY—Dissolution—Subordinate Lodge.—Where the constitution of a beneficial association provided that on the dissolution of a subordinate lodge its property, etc., should be turned over to the grand lodge, a resolution of withdrawal from the order, providing that the property of the lodge should be turned over to a different association, was void, as being *ultra vires*.—KOERNER LODGE, NO. 6, K. of P. v. GRAND LODGE K. OF P. OF INDIANA, Ind., 45 N. E. Rep. 1102.

13. BILLS AND NOTES—Action on Note by Indorsee.—In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity, and for value; and the burden is on the defendant to show that plaintiff is not an innocent holder.—FIRST NAT. BANK OF DUBUQUE v. MCKIBBIN, Neb., 70 N. W. Rep. 38.

14. CARRIERS OF PASSENGERS — Negligence — Proximate Cause.—Where plaintiff alleged that, while alighting from defendant's train at a station, he was violently thrown down and injured by defendant's negligence in starting the train suddenly and defendant alleged that plaintiff's injuries were due to his negligence in jumping from a moving train, the only issue raised was as to which party was negligent; rendering an instruction as to proximate cause erroneous, as misleading.—GULF, C. & S. F. RY. CO. v. ROWLAND, Tex., 38 S. W. Rep. 756.

15. CONFUSION OF GOODS.—It is not a mingling of goods to put potatoes into one end of a trench where potatoes belonging to another person are stored, separated therefrom by a partition of hay.—SCOTT v. SCHOFIELD, Iowa, 69 N. W. Rep. 1127.

16. CONSTITUTIONAL LAW—Delegation of Legislative Power.—The fact that the taking effect of the act in a city is made contingent upon a vote of the city council does not constitute a delegation of legislative power.—STATE v. SULLIVAN, Minn., 69 N. W. Rep. 1094.

17. CONSTITUTIONAL LAW—Federal Judicial Power—Sailors in the Merchant Service.—The power to arrest deserting seamen in the merchant service, and deliver them on board their vessel, is not a part of the "judicial power," as defined by the constitution (article 3, §§ 1, 2); and congress, therefore, had power to confer it, by Rev. St. §§ 4598, 4599, on justices of the peace.—ROBERTSON v. BALDWIN, U. S. S. C., 17 S. C. Rep. 326.

18. CONTRACT—Consideration — Contest of Will.—A contract between an heir at law of a testatrix and certain devisees and legatees under her will, by which the first party agreed to abandon a proposed contest of the will, in consideration of which he was to be paid the amount of a bequest intended to be given him, but omitted from the will by mistake of the draftsman, is not invalid, as against public policy. — WALLER'S ADMX. v. MARKS, Ky., 38 S. W. Rep. 894.

19. CONTRACTS—Public Policy.—A stipulation in a contract giving a person the exclusive agency for the sale of the principal's property for an indefinite period does not render such contract void, as being against public policy.—WOODS v. HART, Neb., 70 N. W. Rep. 53.

20. CONTRACT FOR SALE OF PATENT.—A contract for the sale of a patent for an invention implies the validity of the patent; and where a court of competent authority has declared the patent void, and has enjoined the manufacture and sale of the article patented, the purchaser may defend an action for the price on the ground of want of consideration.—HERZOG v. HEYMAN, N. Y., 45 N. E. Rep. 1127.

21. CORPORATIONS — Contracts.—A corporation having accepted labor and an assignment of stock without any attempt at repudiation, under a contract signed by its general manager alone, but which was agreed to by the officers, and which was reduced to writing, and signed by him in their presence, cannot escape liability thereon because of a by-law requiring that its contracts be signed by at least two of its officers.—WESTERN, ETC. CO. v. FIRST NAT. BANK OF ALBUQUERQUE, N. Mex., 47 Pac. Rep. 721.

22. CORPORATIONS—Dissolution—Abatement.—Under the statute of Oregon (Hill's Ann. Laws, § 3283), providing that corporations, after their dissolution, shall continue to exist for five years, for the purpose of prosecuting or defending suits, etc., a corporation, at the expiration of such five years, becomes absolutely defunct, and a suit, commenced by it before its dissolution, abates.—DUNDEE MORTGAGE & TRUST INVESTMENT CO. v. HUGHES, U. S. C. C., D. (Oreg.), 77 Fed. R. p. 855.

23. CORPORATIONS — Dividends — Limitation of Actions.—A declaration of dividends, which by law is required to be entered on the records of the corporation, is an obligation in writing for the payment of money within the meaning of St. § 2514, providing that actions, on such obligations shall be brought within 15 years.—WINCHESTER & LEXINGTON TURNPIKE CO. v. WICKLIFFE'S ADMR., Ky., 38 S. W. Rep. 866.

24. CORPORATIONS — Insolvency — Preferring Directors.—A mortgage ordered by the board of directors of an insolvent corporation to secure an antecedent debt due a director, whose vote was necessary to a legal expression of the corporate will, is voidable.—SAVAGE v. MILLER, N. J., 36 Atl. Rep. 578.

25. CORPORATION—Insolvent Corporation.—A simple contract creditor of an insolvent corporation, which has ceased to do business, and has been abandoned by its directors, may sue in equity, on behalf of himself and other creditors, to have the assets administered through a receiver, and applied in payment of their debts.—NUNNALLY v. STRAUSE, Va., 26 S. E. Rep. 580.

26. CORPORATIONS — Subscriptions — Organization.—Where subscribers representing 50 per cent. of the capital stock of a proposed corporation unite in calling and holding the first meeting for organization, the fact that other subscribers were not notified of the meeting does not afford grounds for those present and participating to object to the validity of the organization.—NICKUM v. BURCKHARDT, Oreg., 47 Pac. Rep. 788.

27. CRIMINAL EVIDENCE—Homicide—Reputation.—On a trial for murder, a witness who has testified that defendant is a peaceable citizen, and in good order as such, may be asked on cross-examination if defendant is not known to habitually manufacture and sell whisky in open violation of law.—STATE v. DILL, S. Car., 26 S. E. Rep. 567.

28. CRIMINAL EVIDENCE — Rape.—Witness who testifies to the age of the prosecutrix may testify to various collateral circumstances which impressed the date of her birth on his mind.—RICE v. STATE, Tex., 38 S. W. Rep. 803.

29. CRIMINAL LAW—Burglary.—That the act be committed in the nighttime is an essential element of the crime of burglary.—IN RE MCVEY, Neb., 70 N. W. Rep. 51.

30. CRIMINAL LAW—Forgery—Variance.—Under Rev. St. 1889, § 4114, declaring that variance in names shall not be deemed fatal unless it is material and prejudicial to defendant, it is admissible, on a trial for uttering a forged note purporting to be signed by "J. Mugumry," to show that defendant agreed to have J. H. Montgomery sign the note, and represented the signature on the note as his.—STATE v. HARL, Mo., 38 S. W. Rep. 919.

31. CRIMINAL LAW—Pure Food Law — Adulteration.—A sale of beer as food, containing salicylic acid in any quantity, without a label on the package, notifying the purchaser that it contains such an ingredient, is, when found to be poisonous or deleterious to health by its continuous or indiscriminate use, an offense against the pure food laws of the State, under the definition of an "adulteration" contained in clause 7, par. b. § 3, of the act, as amended April 22, 1890.—STATE v. HUTCHINSON, Ohio, 45 N. E. Rep. 1043.

32. CRIMINAL LAW—Subornation of Perjury—Pending Cause.—To come within Rev. St. 1889, § 3670, providing for the punishment of one who attempts to induce a person to commit perjury "in any cause, matter, or proceeding in or concerning which such other person might by law be sworn," etc., such attempt must be in reference to a cause then pending.—STATE v. HOWARD, Mo., 38 S. W. Rep. 908.

33. CRIMINAL PRACTICE—Rape — Indictment.—An indictment under Code Cr. Proc. 1895, art. 633, providing that "rape is the carnal knowledge of a female under the age of fifteen years, other than the wife of the person," an indictment is fatally defective which fails to negative the fact that the female was the wife of defendant.—RICE v. STATE, Tex., 38 S. W. Rep. 801.

34. DAMAGES — Exemplary Damages.—The rule that exemplary damages cannot be allowed against a master for negligence of a servant if he is personally free from fault is not applicable where a railroad train was wrecked, and a person killed, by reason of the failure of the conductor and engineer in charge to obey orders received, though they were competent and selected with due care.—LOUISVILLE, ETC. CO. v. KELLY'S ADMX., Ky., 38 S. W. Rep. 852.

35. DEATH BY WRONGFUL ACT—Damages.—In a statutory action to recover for death by wrongful act, it is error to allow the jury to consider damages sustained by decedent's children from the loss of nurture, instruction, and moral and physical training received from the father, of the value of which there was no evidence.—WALKER v. LAKE SHORE & M. S. RY. CO., Mich., 69 N. W. Rep. 1114.

36. DEEDS—Trees.—When a grantor in a deed conveys hemlock bark and trees upon a certain tract of land "with the right to enter upon said lot of land at any and all times during the term of ten years, to cut any trees, and make necessary roads to remove said bark and trees, during said term, without being liable for trespass," there is not an absolute sale of all the bark and trees upon the land, but only so much as the vendee may cut and remove within the term mentioned.—WEBBER v. PROCTOR, Me., 36 Atl. Rep. 631.

37. DIVORCE—Jurisdiction.—A court of Indiana has jurisdiction to decree a divorce, where the marriage took place and the cause for divorce occurred in another State, only when the applicant has, in good faith obtained a domicile in Indiana.—DICKINSON v. DICKINSON, Mass., 45 N. E. Rep. 1091.

38. DIVORCE IN FOREIGN STATE—Validity.—Where a married woman living with her husband in Arizona goes to Montana to spend the summer, and, on hearing that her husband has commenced action for a divorce, returns to Arizona, and is there served with summons, and thereafter, before decree rendered, returns to Montana, there is no evidence to establish the fact that she was a non-resident of Arizona.—STATE v. GIROUX, Mont., 47 Pac. Rep. 798.

39. DOWER — Assignment.—In assigning dower, the commissioners should not regard merely the fee-simple value of the various tracts, but should estimate the income of the entire estate, and set off to the widow such part as will yield her one-third of such income.—FULLER v. CONRAD'S ADMR., Va., 26 S. E. Rep. 575.

40. ESTOPPEL — Damages.—In an action to recover for the wrongful seizure and sale on execution of plaintiff's wagons left in the hands of its agent, as the property of the agent, it was error to charge that, if the agent claimed the property, plaintiff was estopped from claiming it, where it did not appear that it did any act, or made any false representations to defendants, which caused them to believe that the wagons belonged to the agent, or that, knowing the manner in which the agent was dealing with them, they acquiesced therein.—STRATTON-WHITE CO. v. CASTLEBERRY, Tex., 38 S. W. Rep. 835.

41. EVIDENCE—Parol Evidence to Explain Writing.—In a suit to recover the price of goods delivered under an instrument reciting, "P bought of E (plaintiff) the marble counters $2,500," parol evidence is admissible to prove that the agreed price was more than the sum mentioned.—EMMETT v. PENOYER, N. Y., 45 N. E. Rep. 1041.

42. FEDERAL COURTS—Supreme Court.—A writ of error to a State supreme court cannot be sustained when no federal right was set up or claimed until the filing of a petition for rehearing, after final decision by such court.—PIM v. CITY OF ST. LOUIS, U. S. S. C., 17 S. C. Rep. 322.

43. GARNISHMENT — Funds in the Hands of Assignee.—After an assignment for the benefit of creditors, the funds in the hands of the assignee cannot be bound by process of foreign attachment served upon the assignor as garnishee.—IN RE MCDANIEL & HARVEY CO.'S ESTATE, Penn., 36 Atl. Rep. 567.

44. GUARANTY—Release of Guarantor.—The fact that the debtor gave the creditor security for the debt, payment of which was guarantied, did not discharge the guarantor, where the security was also given expressly for his benefit.—PEORIA SAVINGS, LOAN & TRUST CO. v. ELDER, Ill., 45 N. E. Rep. 1083.

45. HOMESTEAD — Sale on Execution. — The fact that the owner of a homestead executes a warranty deed of it does not authorize its sale on execution against her, where the deed is in fact a mortgage.—WISE v. STEWART, Wash., 47 Pac. Rep. 736.

46. HUSBAND AND WIFE — Cancellation of Deed. — A married woman is not estopped to recover property voluntarily conveyed by her to her husband, such conveyance being void, by the fact that she afterwards joined her husband in conveying it to a third person, without consideration, in order to have it conveyed to a daughter of the husband by a former marriage, in fraud of plaintiff's rights. — CONNAR v. LEACH, Md., 36 Atl. Rep. 591.

47. HUSBAND AND WIFE—Wife's Separate Property.—Where money belonging to the wife was, by her direction, invested in land by the husband, who took title in his own name, the fact that the wife allowed the title so to remain, in ignorance of the effect thereof, does not show an assent to the use of the money for his benefit, sufficient, under Rev. St. 1889, § 6569, to raise the presumption that it had been reduced to possession by the husband. — ALKIRE GROCERY CO. v. BALLENGER, Mo., 88 S. W. Rep. 911.

48. HUSBAND AND WIFE — Wife's Wages — Rights of Creditors.—Under Act April 11, 1873, § 1, providing that the wages of a married woman are free from the debts of the husband, real estate paid for by the labor of the wife is not subject to a judgment against the husband. —WALLACE v. MASON, Ky., 88 S. W. Rep. 887.

49. INSOLVENCY — Preferences — Fraud.—A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others; and this rule may include relatives of the debtor, who are his creditors.—NATIONAL BANK OF COMMERCE v. CHAPMAN, Neb., 70 N. W. Rep. 89.

50. INSURANCE—Assessments—Forfeiture.—Forfeiture of a mutual fire policy for non-payment of assessments is waived if the company, with knowledge of the loss, collects from the insured, and retains, the amount of the delinquent assessments. — MARSHALL FARMERS' HOME FIRE INS. CO. v. LIGGETT, Ind., 45 N. E. Rep. 1062.

51. INSURANCE—Defenses.—The neglect of the insured to use all reasonable means to save the property at and after the fire, and his misconduct in dissuading others from attempting to save it, defeats a recovery only as to the property lost in consequence of such neglect and misconduct.—WOLTERS v. WESTERN ASSUR. CO., Wis., 70 N. W. Rep. 62.

52. INSURANCE—Insurable Interest.—To constitute an insurable interest in realty, the title of the assured need not be one in fee. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him.—HOME INS. CO. OF NEW YORK v. MENDENHALL, Ill., 45 N. E. Rep. 1078.

53. INSURANCE — Parties. — Application of one to be made a defendant in an action on an insurance policy, alleging that he is a stockholder in the company on whose property the policy was issued, that he paid for the insurance, and that the policy should have been made payable to him, but by mistake, and without his knowledge, was made payable to plaintiff, shows an interest entitling him to be made a defendant.—KIRSHBAUM v. HANOVER FIRE INS. CO., Ind., 45 N. E. Rep. 1113.

54. INSURANCE POLICY — Construction of Contract.—The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.—GERMAN FIRE INS. CO. v. ROOST, Ohio, 45 N. E. Rep. 1097.

55. JUDGES — Liability for Judicial Acts. — A judge, acting within his jurisdiction, is not liable to a suit for damages, however illegal or erroneous his acts may be, in the absence of a malicious or corrupt motive.—HOLLON v. LILLY, Ky., 88 S. W. Rep. 878.

56. JUDGMENT—Res Judicata — Indemnity.—In an action by a city on the bond of a contractor, for indemnity after payment of a judgment recovered against it for personal injuries caused by a pipe left on the sidewalk, where the contractor had notice to come in and defend, the judgment roll in that action is conclusive evidence of the amount of the damages, the existence of the obstruction, and the freedom of the injured person from negligence. — MAYOR, ETC. OF CITY OF NEW YORK v. BRADY, N. Y., 45 N. E. Rep. 1122.

57. LANDLORD AND TENANT—Accretions.—A lease for 20 years described the land by its boundaries, the eastern being a river, and as containing "145 acres, more or less," and provided that the rent should be a certain per cent. of the value, to be determined by appraisements at intervals of 10 years: Held, that in such appraisements the lessor was entitled to have considered accretions subsequently formed by recession of the river. — ALLEN v. ST. LOUIS, I. M. & S. RY. CO., Mo., 88 S. W. Rep. 957.

58. LANDLORD AND TENANT — Destruction. — At common law, where there is a covenant on the part of the lessee to pay rent for the term, and buildings on the demised premises are destroyed by fire, the tenant is not relieved from the payment of rent unless he has protected himself by a provision in the lease to that effect.—FELIX v. GRIFFITHS, Ohio, 45 N. E. Rep. 1092.

59. LANDLORD AND TENANT — Vacation by Insolvent Tenant.—A re-entry and reletting by the landlord, under the terms of a lease, after the premises were vacated by the receiver of an insolvent lessee, and a presentation of a claim by the landlord to the receiver for the difference between the amount of rental reserved in the first and second leases, is not a cancellation of the open, subsisting engagement, and substitution of a claim for a contingent liability of the original lessee, which the receiver had no power to recognize. —PEOPLE v. ST. NICHOLAS BANK OF NEW YORK, N. Y., 45 N. E. Rep. 1129.

60. LIBEL PER SE — Proof of Malice. — A certain publication made by the defendant of and concerning the plaintiff as an attorney at law and county attorney set forth in the opinion herein, considered and held, that it is obviously libelous *per se*, and that the trial court rightly instructed the jury that the plaintiff was entitled to a verdict in some amount without proof of malice.—SHARP v. LARSON, Minn., 70 N. W. Rep. 1.

61. LIMITATIONS — Exception — Burden of Proof.—Where the plea is the statute of limitations of six years, and plaintiff replies that defendant is within the exception, because he has not resided in the State for six years, plaintiff has the burden of proof.—CONDON v. ENGER, Ala., 21 South. Rep. 227.

62. LIS PENDENS — Bona Fide Purchaser.—Where the reversal of a decree to enforce a vendor's lien has been entered in the lower court, and no *lis pendens* has ever been filed, one who, for value, and without actual knowledge of the pending suit, purchases the land before another decree is rendered, takes it discharged of the lien, under Rev. St. 1894, § 827 *et seq.* (Rev. St. 1881, § 325 *et seq.*), providing that a suit to enforce a lien on realty, not founded on an instrument executed by the party holding the legal title as appears of record, shall not operate as constructive notice as against a *bona fide* purchaser, unless a *lis pendens* has been filed.—PENNINGTON v. MARTIN, Ind., 45 N. E. Rep. 1111.

63. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, the fact that the examining magistrate discharged plaintiff without evidence in his behalf is *prima facie* evidence of want of probable cause.—HIDY v. MURRAY, Iowa, 69 N. W. Rep. 1138.

64. MARITIME LIENS — Supplies. — One furnishing supplies, on the order of a person or corporation having control and possession of a vessel under a charter party requiring the charterer to provide supplies at his own expense, acquires no lien, when the circumstances are such as to put him on inquiry as to the existence and terms of the charter party, and he fails to make such inquiry, and chooses to act on a mere belief that the vessel will be liable.—THE VALENCIA v. ZIEGLER, U. S. S. C., 17 S. C. Rep. 823.

65. MARRIAGE—Validity — Evidence.—The contract of marriage being a contract *jure gentium*, capable of being entered into as of common right, a common-law marriage between a white man and a colored woman, contracted in another State *per verba de præsenti*, is void, in the absence of proof that common-law marriages or marriages between white and colored persons were prohibited by the laws of that State at the time of the marriage. — LAURENCE v. LAURENCE, Ill., 45 N. E. Rep. 1071.

66. MASTER AND SERVANT—Assumption of Risk.—One who engages to manage a car, and continues in the employment, with knowledge of the character of the brake in use on it, and the manner of using it, with the danger from the use of it obvious, being injured thereby, cannot recover from the master on the ground that it was negligence not to use another kind of brake.—WINKLER v. ST. LOUIS BASKET & BOX CO., Mo., 38 S. W. Rep. 921.

67. MASTER AND SERVANT—Contributory Negligence.—In an action for death of a servant, a charge that no recovery could be had, though defendant was negligent, if deceased "did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of an ordinarily prudent person," is not objectionable in not stating that a failure to use the care which would be used by an ordinary person under like circumstances would be contributory negligence, or as eliminating from the case the doing by deceased of an act which an ordinarily prudent person would not do under the circumstances. — GALVESTON, H. & S. A. RY. CO. v. BONNET, Tex., 38 S. W. Rep. 813.

68. MASTER AND SERVANT — Fellow-servants.—Where an engineer stopped the train in order to go under the engine and repair a hot box, the negligence of the conductor in failing to flag a train following, so as to prevent injury to said engineer, was that of a fellow-servant; it appearing that, though the conductor controlled the movements of the train generally, he had no authority over the engineer in matters affecting the engine. — INTERNATIONAL & G. N. R. CO. v. CULPEPPER, Tex. 38 S. W. Rep. 818.

69. MASTER AND SERVANT—Negligence — Vice-principal.—Whether one of several employees of the same master is a vice-principal as to his co-employees, or whether all are fellow-servants, is not always a question of fact nor always a question of law. Generally it is a mixed question of law and fact, and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented. The fact that one employee is vested with authority to hire and discharge a co-employee is not conclusive evidence that, as to such co-employee, he is a vice-principal; nor does it follow that one employee is not a vice-principal as to his co-employees because not vested with the authority to hire and discharge them.—UNION PAC. RY. CO. v. DOYLE, Neb., 70 N. W. Rep. 48.

70. MECHANICS' LIENS.—Under a statute giving to one who furnishes any material, machinery, or fixtures for any improvement on land a lien on such improvement and the land on which it is situated, he has no lien for wrenches or belting furnished, in no way attached to the real estate, or a necessary part of machinery thus attached.—MEEK v. PARKER, Ark., 38 S. W. Rep. 900.

71. MECHANICS' LIENS—Contracts—Performance.—In order that the subcontractor may acquire a mechanic's lien, it is not necessary that his contract and his performance of the same should conform in all respects to the contract between the contractor and the owner; and in a case where brick furnished as aforesaid by the subcontractor, and used in the building, were inferior in quality to those called for by either contract, it is held that the owner had no defense against the lien except such as could have been interposed by the contractor against the claim for personal judgment against him.—WISCONSIN RED PRESSED BRICK CO. v. HOOD, Minn., 69 N. W. Rep. 1092.

72. MECHANICS' LIENS—Proceedings to Perfect.—The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected.—DREXEL v. RICHARDS, Neb., 70 N. W. Rep. 28.

73. MORTGAGES — Insurance.—A mortgagee, holding a fire policy providing that the loss, if any, should be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage, and bid in the premises at the sale for the full amount of his debt. Afterwards, but before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale: Held, that the mortgagor could not recover of the mortgagee the amount so paid, but, if he had redeemed, he would have been entitled to have had the amount applied *pro tanto* on the redemption.—CALSON v. PRESBYTERIAN BOARD OF RELIEF FOR DISABLED MINISTERS, Minn., 70 N. W. Rep. 8.

74. MORTGAGE—Tax Title.—The grantee of a mortgagor, who has covenanted to pay the taxes on the mortgaged premises, whether he is the immediate or remote grantee, or whether he gets his title by deed or through a second mortgage, is disqualified from acquiring and holding a tax title to the mortgaged premises, as against the mortgagee.—AMERICAN BAPTIST MISSIONARY UNION v. HASTINGS, Minn., 69 N. W. Rep. 1078.

75. MORTGAGE FORECLOSURE—Pleading—Assumption of Debt.—A complaint in foreclosure which alleges a sale of the premises, and an assumption by the vendee of the mortgage debt, but alleges that, though the deed was executed to such vendee, "your orator is advised" that he was acting as agent for another, but "of this your orator can make no positive statements, but can rely only on what he has been informed by others," will not sustain a decree that the alleged principal had assumed the mortgage debt, and was liable as purchaser.—FISHER v. WHITE, Va., 26 S. E. Rep. 573.

76. MORTGAGE IN TRUST FOR PREFERRED CREDITORS.—Where one in embarrassed circumstances makes and delivers a chattel mortgage to a third person in trust for certain of his creditors, with the requirement that he shall sell the property at retail, and apply the proceeds to the claims of the preferred creditors until paid in full, and afterwards, with the consent of his other creditors, to continue to sell and apply the proceeds to their claims *pro rata*, and the property so mortgaged is largely in excess of the amount of the claims of the preferred creditors, the legal effect of such mortgage is to hinder and delay his other creditors, within the meaning of section 6844, Rev. St., and no action for damages can be maintained by the mortgagor against the trustee for a failure to execute the trust.—BRINKERHOFF v. TRACY, Ohio, 45 N. E. Rep. 1100.

77. MUNICIPAL CORPORATION — Assessment.—An objection that land assessed by lots for a public improvement had never been laid out in lots may be taken in proceedings to obtain a judgment of sale after confirmation of the assessment, since in such case the confirmation is void.—PEOPLE v. EGGERS, Ill., 45 N. E. Rep. 1074.

78. MUNICIPAL CORPORATION — Contract — Fraud.—Where a contract by a city is not induced by corruption of its officers by the other party, it can recover from the other party, on the ground of fraud, only on such proof as will authorize recovery by an individual.—CITY OF TACOMA v. TACOMA LIGHT & WATER CO., Wash., 47 Pac. Rep. 738.

79. MUNICIPAL CORPORATIONS—Defective Sidewalks—Ice and Snow.—Where snow, accumulated on a walk from natural causes, becomes uneven, by travel, or where the walk is so constructed as to dam up melted snow flowing from adjoining land, and it freezes into ridges, a person injured thereon while using ordinary care may recover from the city, if it permitted such condition to exist for an unreasonable time after the same became known to the authorities, or might have been known by reasonable care.—HUSTON v. CITY OF COUNCIL BLUFFS, Iowa, 69 N. W. Rep. 1130.

80. MUNICIPAL CORPORATION — Extension of Limits—Taxation.—Where land adjoining a town is brought in by an extension of the limits, and is subdivided into lots, and a street is extended through them, a four-acre lot, mostly unfit for cultivation, and on which the owner has built a house, and carries on the busi-

ness of a tailor, is town property, for purposes of taxation.—CITY OF LEBANON V. BEVILL, Ky., 38 S. W. Rep. 873.

81. MUNICIPAL CORPORATIONS — Issuance of Bonds—Illegality of Election.—An injunction restraining the officers of a municipal corporation from issuing bonds of the corporation, because of irregularity in the election authorizing them, does not preclude the right to issue the bonds upon a new election.—DANIELS V. LONG, Mich., 69 N. W. Rep. 1112.

82. MUNICIPAL CORPORATIONS — Taxing Non-resident Attorneys.—Under a charter authorizing the common council to raise annually, by taxes and assessments, such sums as they may deem necessary, and in such manner as they may deem expedient, the council may tax both resident and non-resident attorneys, who have their offices in the city, and practice their profession there.—CITY OF PETERSBURG V. COCKE, Va., 26 S. E. Rep. 576.

83. NEGLIGENCE—Evidence—Damages.—Where a gas company, in connecting a house with its main in a city, used a cracked elbow, which it was often called to repair, it was liable for injuries resulting from an explosion of gas leaking through such elbow, where it had failed to remove it, or to close the crack known to exist therein.—RICHMOND GAS CO. V. BAKER, Ind., 45 N. E. Rep. 1049.

84. NEGLIGENCE—Injury to Employee.—Where a partially loaded car was shunted on the track leading into a railroad repair shop, by employees working in the yard, with such force that it crashed through the closed doors of the shop, and killed an employee working inside, who could not see its approach, and it appeared that the shunting of cars on such tracks toward the shops was a common practice, and the existence of a rule against it was in dispute, the question of whether the railroad company was negligent in failing to furnish the deceased a reasonably safe place to work was one for the jury.—DOING V. NEW YORK, O. & W. RY. CO., N. Y., 45 N. E. Rep. 1028.

85. NEGLIGENCE — Railroads — Proximate Cause.—Plaintiff alleged that he was repairing defendant's track; that the foreman sent an employee back to signal an approaching train; that the signal was given, but the train was not stopped, owing to the engineer's negligence or the insufficiency of brakes; that, as the train approached, plaintiff stood aside to escape it; that, as it neared plaintiff, the fireman, to avoid danger which he properly apprehended, jumped from the engine, against plaintiff, and injured him: Held, that the alleged negligence of defendant was the proximate cause of the injury.—JACKSON V. GALVESTON, H. & S. A. RY. CO., Tex., 38 S. W. Rep. 745.

86. NUISANCE — Obstructing Navigable Stream.—A person engaged in the business of fishing in a navigable stream is specially damaged by the placing of an obstruction in such stream which interferes with the carrying on of his business, and may sue on behalf of himself and others similarly situated to enjoin such obstruction.—MORRIS V. GRAHAM, Wash., 47 Pac. Rep. 752.

87. NUISANCE — Obstruction of Alley — Damages.—In an action for damages to plaintiff's lots, abutting on an alley, on which were two cottages, by closing one end of the alley for five years, it appeared that one cottage was rented, and the other was used by plaintiff's son, rent free. The court charged that plaintiff was entitled to compensation for deprivation of the reasonable use of the alley during the five years: Held, that the jury were not thereby authorized to go beyond compensation for loss in rental value, and, in the absence of a request by defendant for an instruction limiting recovery to such loss, the verdict would not be disturbed, where it was evident it was based on such diminution.—BANNON V. MURPHY, Ky., 38 S. W. Rep. 889.

88. PARTNERSHIP — Account. — Complainant entered into partnership with defendant, purchasing a third interest, the contract providing that the amount to be paid therefor should be adjusted on the cost of the plant, as shown by defendant's vouchers. Both parties subsequently sold their interests to another: Held, that the sale did not relieve defendant from liability to account to complainant under the contract of purchase, and for the business done during the existence of the partnership. — FEIGE V. BABCOCK, Mich., 70 N. W. Rep. 7.

89. PARTNERSHIP AND INDIVIDUAL CREDITORS—Estoppel.—A member of a banking firm engaged in an outside venture under a corporate name, owning practically all the stock himself. The corporation was indebted to the bank for money lent. The bank became insolvent, and the corporation went into a receiver's hands: Held that, as the owner of the corporation was a member of the bank, the latter was not entitled to share in the assets of the corporation until its other creditors had been paid.—POTTS V. SCHMUCKER, Md., 36 Atl. Rep. 592.

90. PLEADING—Duplicity—Municipal Corporations.—In *assumpsit* against a town treasurer, a plea that the town had reached its debt limit when it contracted the debt in suit, and that there was no money in defendant's hands then, nor at any time since, with which the debt could have been paid, is not bad for duplicity, since the first allegation alone does not state a complete defense.—MCALEER V. ANGELL, R. I., 36 Atl. Rep. 588.

91. PRINCIPAL AND AGENT—Agent's Authority.—There is no presumption that a special agent of the insured to place and manage insurance has authority, after procuring and delivering policy, to surrender or discharge it.—JOHN R. DAVIS LUMBER CO. V. HOME INS. CO. OF NEW YORK, Wis., 70 N. W. Rep. 59.

92. PRINCIPAL AND SURETY — Fraud.—Defendant, a surety on a note, was discharged, where, after he had agreed to a renewal of the note, the payee and a second surety, with the fraudulent intention of making defendant alone responsible as between the sureties, induced defendant, who could neither read nor write, to sign by a mark a renewal note so drawn as to make him a principal, while the second surety signed as security merely.—HAMILTON V. WILLIAMS, Ky., 38 S. W. Rep. 851.

93. PRINCIPAL AND SURETY—Misfeasance Prior to the Execution of the Bond.—The sureties on a postmaster's bond are not liable for a shortage in his accounts occurring before the bond was given.—UNITED STATES V. VAN STEINBERG, U. S. D. C., E. D. (Iowa), 77 Fed. Rep. 860.

94. RAILROADS — State Regulations.—Under Const. art. 10, § 2, giving the legislature power "to regulate railroad freight and passenger tariffs, correct abuses, and prevent unjust discrimination and extortion" in rates, the power to correct abuses is not restricted to such as are connected with freight and passenger tariffs.—RAILROAD COMMISSION OF TEXAS V. HOUSTON & T. C. R. CO., Tex., 38 S. W. Rep. 750.

95. RAILROAD COMPANY—Condemnation Proceedings.—Railroad companies, being required by Rev. St. 1895, art. 4435, "to place and keep" in repair that portion of their ways across which county roads may run, are not entitled, on condemnation of a strip for such a road, to recover, in addition to the market value of the land taken, the cost of grading, building cattle guards, and other expenses which the establishment of the road necessitates.—GULF, C. & S. F. RY. CO. V. MILAM COUNTY, Tex., 38 S. W. Rep. 747.

96. RECEIVER—Insufficient Showing.—A receiver will not be appointed, in an action to recover possession, on mere allegations that plaintiffs are the owners in fee and entitled to the possession, which defendants unlawfully withhold, to plaintiff's damage.—SENGFELDER V. HILL, Wash., 47 Pac. Rep. 757.

97. RES JUDICATA—Identity of Issues.—The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name,

but in fact and in substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not, if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression, then the truth is not excluded, and the judgment no answer to the different issue.—VILLAGE OF WAYZATA V. GREAT NORTHERN RY. CO., Minn., 69 N. W. Rep. 1073.

98. SALE—Contract—Evidence of.—On an issue as to the sufficiency of a heating apparatus to properly warm a building, where it was claimed that its failure was due to the faulty construction of the building, evidence of the comparative results obtained from such plant and another subsequently placed in the same building is admissible.—KRAMER V. MESSNER, Iowa, 69 N. W. Rep. 1143.

99. SCHOOL DIRECTORS—Employment of Teacher.—A board of school directors can make a valid contract with a teacher for a term of school to begin in the next succeeding school year, and after the term of one of the directors has expired.—TAYLOR V. SCHOOL DIST. NO. 7 OF CLALLAM COUNTY, Wash., 47 Pac. Rep. 758.

100. STATUTES—Enactment.—Where the report of a committee of conference on senate amendments to a bill first passed by the house is adopted in each branch by a majority vote taken by yeas and nays, and the names of those voting recorded on the journal, pursuant to Const. art. 4, § 32, the provision of section 31 that no bill shall become a law unless, "on its final passage," the vote to be taken by yeas and nays, etc., and the names of the members voting be recorded on the journal, is satisfied.—BROWNING V. POWERS, Mo., 38 S. W. Rep. 943.

101. TAXATION—Migratory Stock Law.—Laws 1895, p. 105, ch. 61, providing that live stock driven into the State for the purpose of grazing after the first Monday in April in any year shall be assessed for taxes as if it had been in the county at the time of the annual assessment, is not unconstitutional, as discriminating between live stock and other property.—WRIGHT V. STINSON, Wash., 47 Pac. Rep. 761.

102. TAXATION—Personal Property.—The *situs* of personal property in the hands of a trustee under a will, for the purpose of taxation, is the domicile of the trustee.—CITY OF WALLA WALLA V. MOORE, Wash., 47 Pac. Rep. 753.

103. TAXATION OF NATIONAL BANK SHARES.—Under the restriction contained in Rev. St. U. S. § 5219, that the shares of stock in national banks shall not be taxed by a State at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, such shares are not taxable under the statute for the taxation of personal property generally; the owner of "other moneyed capital" invested in credits, whether by a corporation in which he is a stockholder, and which is assessed under Pol. Code Cal. § 3608, or by himself individually, being entitled by *Id.* § 3629, to a deduction from his assessment for debts due to *bona fide* residents of the State, while the owner of bank stock, which is property, and not a credit, cannot obtain such deduction.—MCHENRY V. DOWNER, Cal., 47 Pac. Rep. 779.

104. TRUST DEED — Death of Grantor. — Where a grantor in a trust deed for creditors dies before the trust is executed, and there is a condition of affairs authorizing the appointment of an administrator, the authority of the trustee is terminated, and the district court has no jurisdiction to authorize the trustee to enforce the trust, though no administration is pending, and all the property belonging to the estate is embodied in the trust deed.—THAXTON V. SMITH, Tex., 38 S. W. Rep. 820.

105. USURY—Bank Discount.—A was indebted to B in a certain sum, and C in a further sum. The contract with C was usurious. A obtained a larger loan from B, and from its proceeds discharged both debts. C acted as the agent of B in examining the title and drawing the instruments, and in paying the money; but C's debt was entirely separate from B's, and B was not aware that the additional money borrowed from him was to be used in satisfying C's usurious loan: Held, that the last transaction was not tainted by the usury inherent in the debt to C.—STEEN V. STRETCH, Neb., 70 N. W. Rep. 48.

106. VENDOR AND PURCHASER — Fraudulent Representations.—A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property, and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the purchaser.—MULLEN V. KINSEY, Neb., 70 N. W. Rep. 18.

107. VENDOR AND PURCHASER—Fraudulent Representations.—As a general rule, a misrepresentation which embodies matter of law is one upon which a party cannot rely, as all parties are presumed or bound to know the law; but where it is as to the law of another State, or its effect, it is not within the rule, and may be fraudulent, and ignorance of the law may be pleaded by the one to whom the misrepresentation is made.—WOOD V. ROEDER, Neb., 70 N. W. Rep. 21.

108. VENDOR AND PURCHASER—Sale—Rescission.—One cannot rescind a contract for purchase of land merely because the vendor was unable, owing to refusal of a tenant to vacate, to deliver possession till seven or eight days after the time stipulated, such delay being unimportant, and being used merely as an excuse in aid of a desire to rescind.—ARMSTRONG V. BREES, Iowa, 69 N. W. Rep. 1125.

109. WATERS—Irrigation—Public Lands.—The act of congress of March 3, 1891, regrading irrigating reservoirs, canals, and ditches on the public domain, applies only to public land which was vacant and unoccupied at the time of its passage, and does not authorize one proceeding under its provisions to interfere with the possessory rights of settlers, though without title, acquired before its passage. — NIPPEL V. FORKER, Colo., 47 Pac. Rep. 766.

110. WATER RIGHTS — Injunction. — The fact that a riparian owner who has purchased a right to a certain number of cubic feet of water per minute constantly wastes part of the water so purchased does not entitle an upper owner, who took subject to the purchase, to withhold a part of the other's water equal to the amount which the other wastes. — HOME ELECTRIC LIGHT & POWER CO. V. GLOBE TISSUE PAPER CO., Ind., 45 N. E. Rep. 1108.

111. WILLS—Presumption of Revocation.—Where it is established that testatrix executed a valid will, and left it with a notary, the presumption of revocation arising from the fact that it could not be found after her death, and from the evidence of the notary that she had it in her possession last, is rebutted by the frequent declarations of testatrix, up to within three days of her death, that the will was with the notary, and warrants its establishment as a lost will.—IN RE STEINKE'S WILL, Wis., 70 N. W. Rep. 61.

112. WILLS—Presumption of Testamentary Capacity.—Where the formal execution of a will is proved, and the subscribing witnesses testify to the proper age and sanity of the testator, the law presumes that he was possessed of testamentary capacity; and, without substantial evidence to the contrary, the court should not submit the issue to a jury. — MCFADIN V. CATRON, Mo., 38 S. W. Rep. 932.

113. WILLS—Substitution of Unprobated Will—Limitations.—A proceeding to substitute a will not probated for one probated involves a contest of the latter, and must be brought within the three years after the offering thereof for probate given by Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596), for contest thereof, notwithstanding the former will has been concealed, and section 301 (section 300) provides that a cause of action which has been concealed may be prosecuted within the period of limitation after its discovery. — BARTLETT V. MANOR, Ind., 45 N. E. Rep. 1060.